SUPREME COURT, U.S.
FILED

941318 JAN 31 1995

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

IN THE MATTER OF EDMUND M. HURLEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the Supreme Judicial Court of Massachusetts precluded from denying that petitioner's conviction in the United States District Court for the District of Massachusetts under 18 U.S.C. Sec. 371, "conspiracy to defraud the United States by impeding the Internal Revenue Service" is a "tax offense" for the purpose of determining whether a judgment of indefinite suspension from the practice of law entered against petitioner is markedly disparate from those judgments ordinarily entered in bar disciplinary proceedings?

Parties

This disciplinary proceeding against petitioner was filed in the Supreme Judicial Court for the Commonwealth of Massachusetts by Bar Counsel in the Board of Bar Overseers of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Board of Bar Overseers:

John A. Wickstrom, Chairman

C. Brian McDonald, Vice Chairman

Janis M. Berry

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REFERENCE TO COURT OPINIONS

1. The report of the opinion of the Supreme Judicial Court was entered September 12, 1994. 418 Mass. 649 (1994) (Appendix, A. 1 through A. 22)

2. The Report and Recommendation of the Hearing Panel consisting of findings of fact and disposition was served February 22, 1993. (Appendix, A. 34 through A. 47)

3. The order of the Single Justice of the Supreme Judicial Court, Lynch, J. was entered August 30, 1993. (Appendix, A. 57, 58)

4. The Notice of Denial of Petition for Rehearing is dated November 2, 1994. (Appendix, A. 61)

GROUNDS FOR JURISDICTION

The Supreme Judicial Court for the Commonwealth of Massachusetts has refused to acknowledge that the crime of which petitioner was convicted in the United States District Court for the District of Massachusetts, and affirmed by the United States Court of Appeals for the First Circuit, is 18 U.S.C. Sec. 371, conspiracy to defraud the IRS, a tax offense. The Supreme Judicial Court of Massachusetts has decided a federal issue in a way that conflicts with the United States Court of Appeals for the First Circuit. 18 U.S.C. 371, is a "tax offense" for the purpose of disciplining petitioner. "A right claimed under the Federal Constitution, finally adjudicated in

the Federal courts, can never be taken away or impaired by state decisions." Deposit Bank v. Frankfort, 24 S.Ct. 154, 191 U.S. 499, 48 L.Ed276 (1903) Federal judgments are as powerful in state courts as are judgments of other states and such a federal judgment identifying petitioners offense is entitled to Full Faith and Credit under Article IV of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

Article IV of the United States Constitution
(Included in Appendix at A. 64)

18 U.S.C. Sec. 371
Conspiracy to commit offense or to defraud United States
(Included in Appendix at A. 64)

18 U.S.C. Sec. 1341
Frauds and Swindles
(Included in Appendix at A. 64, 65)

18 U.S.C. Sec. 1956
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26 U.S.C. Sec. 7201
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(Included in Appendix at A. 70)

Supreme Judicial Court Rules 4:01, Sec. 12(1) and (2) Bar Discipline, Attorneys Convicted of Serious Crimes
(Included in Appendix at A. 70,71)

Supreme Judicial Court Rule 4:01, Sec. 18(1) Reinstatement
(Included in Appendix at A. 71,72)

Statement of the Case

On June 12, 1990, Bar Counsel filed a petition for discipline against petitioner Edmund M. Hurley, a member of the bar of the Commonwealth of Massachusetts since November 14, 1963 (and of the Supreme Court of the United States since April 23, 1979) stating that petitioner had been found guilty on April 19, 1990 in the United States District Court for the District of Massachusetts of violating 18 U.S.C. Sec. 371, a serious crime as defined by Supreme Judicial Court Rule 4:01, Sec. 12(2)(A. 27-30)

The Petition for Discipline also stated:

> "6. The respondent's actions constituted a violation of Canon One, Disciplinary Rules 1-102 (A)(4), (5), and (6)." --- (A. 28,29)

The only 'actions' referred to in the Petition for Discipline is petitioner's conviction under 18 U.S.C. Sec. 371. (A. 23-24)

As Terence M. Troyer, Assistant Bar Counsel, who prosecuted petitioner's Petition for Discipline stated in his oral presentation before the Hearing Panel of the Board of Bar Overseers In the Matter of John R. Jennings:

> "It is customary that the [Disciplinary Rule] 1-102 violation is used in felony cases. It might be more desirable if the rule specified that the conviction of a felony or misdemeanor or serious crime is a separate violation of a separate disciplinary rule, but we have, in fact, no such rule. So only the elastic rules under 1-102A are the ones implicated. These are the ones that are customarily found to be violated by an attorney who was guilty of a felony. In any event, I'm not sure that

> is a matter [which] requires deep cogitation by the [Hearing Panel]. It's clear a felony has been committed." Transcript of hearing held January 11, 1993 In Re John R. Jennings, pp. 16-17.
> 9 Mass.Att'y.Disc.R.

On July 9, 1990, in the United States District Court for the District of Massachusetts, petitioner, as a result of his conviction under 18 U.S.C. sec. 371, was sentenced to two years imprisonment, eight months to be served, balance suspended, with sixteen months probation and a fine of $10,000. (A. 23-26)

On February 14, 1992, the United States Court of Appeals for the First Circuit entered an opinion affirming petitioner's conviction under 18 U.S.C., Sec. 371, United States v. Hurley, 957 F.2d 1 (1st Cir. 1992).

cert. den. 113 S.Ct. 60, 121 L.Ed.2d 28 (October 5, 1992)

In the opinion of the Court of Appeals for the First Circuit is found the following: "The Jury returned guilty verdicts solely on a charge of conspiracy to defraud the IRS in violation of 18 U.S.C. Sec. 371." United States vs. Hurley, supra, at 2.

In the opinion of the Court of Appeals for the First Circuit is found the following obiter dictum:

> "Thus, so long as the record contains sufficient evidence for a jury to conclude beyond a reasonable doubt that defendants knowingly participated in laundering drug proceeds, inevitably hindering the IRS in its ability to collect Caruana's taxes, their convictions under Sec. 371's defraud clause are unassailable." United States v. Hurley, supra, at 4.

On May 14, 1992 petitioner simultaneously (1) filed with the Supreme Judicial Court an affidavit of compliance signifying his temporary suspension from the practice of law (A. 31-32) and (2) reported to Allenwood Federal Prison Camp to commence his term of imprisonment which ended on October 15, 1992, five months and one day later.

A hearing panel of the Board of Bar Overseers was convened on January 5, 1993 which issued a Report and Recommendation dated February 22, 1993. (A. 34-47)

The Hearing Panel Report included, intra alia, the following findings and recommendation:

> "Further, we find that Mr. Hurley has been a diligent, hardworking, caring attorney who has competently and ethically

represented his clients for over twenty-five years." (A. 41)

"We accept as fact, without reservation, Mr. Hurley's qualities as an attorney and acknowledge that, except for the Caruana episode, we all could have been proud of his performance." (A. 41).

"We find that Mr. Hurley has been convicted of a serious crime as defined by Supreme Judicial Court rule 4:01, Sec. 122). We find that he has violated Canon One, D.R. 1-102(A) (4), (5), and (6)." (A. 45)

"We believe that the Respondent's conduct is not as egregious as that found in the Matter of Rogers, S.J.C. No. 91-9 BD, 9/26/91. We believe the facts in this case are closest to those found in Matter of Lucid, 6 Mass.Att'y.Disc.R. 210 (1990)." (A. 45, 46)

We unanimously recommend to the Board of Bar Overseers that Mr. Hurley be indefinitely suspended from the practice of law retroactive to May 15, 1992." (A. 46)

At a meeting of the Board of Bar Overseers held April 12, 1992, the Board of Bar Overseers adopted the Hearing Panel's report and its recommendation to file an information with the Supreme Judicial Court. (A. 48, 49)

On May 4, 1993, the Board of Bar Overseers filed an Information and Record of Proceedings in the Supreme Judicial Court for Suffolk County. (A. 50-56)

On August 30, 1993 a single justice of the Supreme Judicial Court, Lynch, J., ordered and adjudged (1) that respondent be indefinitely suspended from the practice of law and (2) that respondent be allowed to become a paralegal upon completion of his term of probation imposed by the United States District Court. (A. 57)

On September 12, 1994 the Supreme Judicial Court of Massachusetts entered an opinion affirming the order of the single justice who had "appropriately suspended [petitioner] indefinitely from the practice of law." In the Matter of Edmund Hurley, 418 Mass. 649 (1994) (A. 1-22)

In the opinion, the Supreme Judicial Court states the following:

> "We turn to [petitioner's] argument that we should consider only other 'tax offenses' in deciding whether the disciplinary sanction imposed on him was markedly disparate from the sanction imposed by other single justices in similar cases. Our short answer to this argument is that the appropriate level of sanctions does not depend on the catch-phrase that might be used to describe the conduct on which those sanctions are grounded. It is irrelevant to us, and we assume it was to the single justice, whether the

> [petitioner's] conduct could be labelled a 'tax offense' or 'money laundering.' Instead, we look at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases." In the Matter of Edmund M. Hurley, supra, at 654 and 655. (A. 15, 16)

An attorney who is indefinitely suspended from the bar of the Commonwealth of Massachusetts "may not be reinstated otherwise than upon his petition filed in [the Supreme Judicial Court] after the expiration of at least five years from the effective date of the order of disbarment, suspension or allowance of resignation." Supreme Judicial Court Rule 4:01, Sec. 18 (1) (A. 97)

There were twenty-nine Massachusetts attorneys convicted of committing tax offenses reported in eight published volumes of

Massachusetts Attorney Discipline Reports covering the period from September 1, 1974 through December 31, 1992 and reported in Massachusetts Law Weekly from January 1, 1992 through November 22, 1993. The statutes which those twenty-nine attorneys violated were:

Mass. G.L. c.62c, Sec. 73 (tax evasion; penalties:up to $100,000 fine, 5 years imprisonment, costs of prosecution) (A. 62)

18 U.S.C. Sec. 371 (conspiracy to defraud IRS; penalties: up to $10,000 fine, 5 years imprisonment) (A. 62)

18 U.S.C. Sec. 1341 (frauds and swindles, penalties: up to $1,000 fine, 5 years imprisonment (A. 63-64)

26 U.S.C. Sec. 7201 (attempt to evade or defeat tax; penalties:

up to $100,000 fine, 5 years imprisonment) (A. 64)

26 U.S.C. Sec. 7203 (willful failure to file return, supply information, or pay tax; penalties: (1) misdemeanor, fine up to $25,000, imprisonment 1 year, (2) felony, fine up to $25,000, imprisonment 5 years (A. 64-65)

26 U.S.C. Sec. 7206 (willful failure to collect or pay over tax; penalty: $100,000 fine, 3 years imprisonment, costs of prosecution) (A. 65-67)

All twenty-nine attorneys (having been found guilty of tax offenses) were found to have been convicted of a serious crime under Supreme Judicial Court Rule 4:01, Sec. 12(1) by the Board of Bar Overseers. Except for petitioner's disposition of an indefinite suspension (five years minimum), the maximum discipline was a

two-year suspension, In the Matter of Joseph Berlandi, S.J.C. No. 86-33 BD, 5 Mass.Att'y.Disc.R., (conviction under 18 U.S.C. 1341 and 26 U.S.C. 7203). Two attorneys received 18-month suspensions: In the Matter of James F. Weldon, S.J.C. No. 77-9BD, 1 Mass.Atty.Disc.R.296(conviction under 26 U.S.C. 7203 plus seven complaints alleging professional misconduct) and In the Matter of John R. Jennings, S.J.C. No. 91-50 BD (conviction under 26 U.S.C. 7201). One attorney received a 1 year, 16 months, 12 days suspension for being convicted of both 26 U.S.C. 7201 and 26 U.S.C. 7206(1) (In re Nowak, S.J.C. No. 75-12BD, 1 Mass. Att'y Disc.R. 229) Four attorneys received one-year suspensions. Seventeen attorneys received sanctions from the Supreme

Judicial Court ranging from five months 11 days to ten months. Three attorneys received a public censure.

In each of the nine volumes of the Massachusetts Attorney Discipline Reports, an annual publication of the decisions of the Supreme Judicial Court of Massachusetts compiled by the Board of Bar Overseers and published by Butterworth Legal Publishers, is an index of "Public Discipline Imposed by the Supreme Judicial Court." Under "Part B," entitled "Grounds for Discipline" is a listing of each attorney and the "serious crime" of which he or she was convicted (Supreme Judicial Court Rule 4:01, Section 12). In the Synopsis of Index there is listed, under "Part B," 37 specific crimes ranging from "Aiding and Abetting" to "wire fraud and "other."

In Volume Eight, on the occasion of the inclusion of the order of temporary suspension entered June 5, 1992 by the single Justice of the Supreme Judicial Court, Lynch, J., appears a description of petitioner's "serious crime" as that

> "of conspiring to defraud the United States by impeding, impairing, and obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation and collection of income taxes owed by a client."
> (8 Mass.Att'y.Disc.R. 107),

and petitioner is listed under Part "B" as having been convicted of a "tax offense" (8 Mass.Att'y.Disc.R. XXViii). Petitioner is not listed as having violated any disciplinary rules in Volume Eight.

In Volume Nine of Massachusetts Attorney Discipline Reports, on the

occasion of the inclusion the order of the Single Justice of the Supreme Judicial Court, Lynch, J., entered August 30, 1993, indefinitely suspending petitioner from the practice of law (A. 57-61) is the following description of petitioner's offense:

> Petitioner "was convicted in 1990 of the felony of conspiracy to defraud the United States by knowingly helping a drug smuggler conceal his profits from the Internal Revenue ue Service. He was sentenced to a term of incarceration, which has now been served. His probation was scheduled to expire in February, 1994.
>
> The Board rejected his contention that he did not know the source of the money."
> 9 Mass.Att'y.Disc.R.169 (1994)
>
> The [petitioner] participated in transactions in which large amounts of cash were exchanged in suitcases or brown bags.

In Volume Nine of Massachusetts Attorney Discipline Reports, petitioner was not included in any of the criminal classifications of "serious crimes" under "Part B," "Grounds for Discipline," nor was he listed as having violated any discipline rule.

The crime of "money laundering" is 18 U.S.C. Sec. 1956 which provides for imprisonment for up to twenty years. (A. 67-68)

The standard of review applied to decisions of a single justice in a bar discipline matter in the Commonwealth of Massachusetts was enunciated by Chief Justice Hennessey as follows:

> "Thus, review by the full court, on appeal from the single justice's judgment, must be by a standard which promotes even-handed results in such

> cases. Accordingly, we think that the full court, in reviewing any disciplinary decision, should inquire whether the judgment is markedly disparate from those ordinarily entered by the various single justices in similar cases." In the Matter of Alter, 389 Mass. 153, 157 (1983)

Petitioner filed a petition for rehearing concerning the opinion of the Supreme Judicial Court, In the Matter of Edmund M. Hurley, 418 Mass. 649 (1994), which was denied on November 2, 1994. (A. 61)

Petitioner now files this Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Argument

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IS PRECLUDED FROM DENYING THAT PETITIONER'S CONVICTION UNDER 18 U.S.C. SEC. 371 ("CONSPIRACY TO DEFRAUD THE UNITED STATES BY IMPEDING THE INTERNAL REVENUE SERVICE") IS A TAX OFFENSE FOR THE PURPOSE OF DETERMINING WHETHER A JUDGMENT OF INDEFINITE SUSPENSION FROM THE PRACTICE OF LAW ENTERED AGAINST PETITIONER IS MARKEDLY DISPARATE FROM THOSE JUDGMENTS ORDINARILY ENTERED IN BAR DISCIPLINARY PROCEEDINGS.

Historically, 18 U.S.C. Sec. 371 was a tax statute from the beginning.

> "In 1866, congress made it a crime for these [government] inspectors [at distillaries] to conspire with distillery proprietors or with anyone else to defraud the United States of the revenue or tax arising from distilled spirits,' or

> tax arising from distilled spirits,' or, 'with intent to defraud the United States of such revenue or tax,' to make 'any false or fraudulent entry, certificate or return.' Act of July 13, 1866, ch. 184, Sec.38, 14 Stat. 159. Sec. 46 Cong. Globe, 39th Cong. 1st Sess. 2387-88 (1866) (remarks of Senator Thayer)
>
> Before any opportunity arose to measure the impact of the 1866 statute, the continuing clamor for even greater repression of the tax violator [citations omitted] impelled Congress, in 1867, to pass 'An Act to amend existing laws relating to Internal Revenue and for other Purposes" - a thirty-four section statute which plugged loop-holes in the tax laws and, in addition, created a number of new tax offenses. [citations omitted]. Conspiracy to Defraud the United States, Abraham S. Goldstein, 68 Yale L.J. 405 at 417 and 418 (1959).

Petitioner, an attorney, was convicted of a "serious crime" in the United States District Court for the District of Massachusetts on April 19,

1990. (A. 23) That crime was 18 U.S.C. Sec. 371 and the conviction was upheld by the United States Circuit Court of Appeals for the First Circuit. 957 F. 2d 1 (1st Cir. 1992), cert. den. 113 S.Ct. 60, 121 L.Ed.2d 28.

The Court of Appeals for the First Circuit described petitioner's conviction as being "a charge of conspiracy to defraud the I.R.S. in violation of 18 U.S.C. Sec. 371." 957 Fed.2d 1, 2 (1st Cir. 1992)

Unfortunately and inaccurately, the First Circuit Court of Appeals, later in the opinion included the obiter dictum quoted in the Statement of the Case referring to the jury being able to conclude "beyond a reasonable doubt that [petitioner] knowingly participated in laundering drug proceeds, inevitably hindering

the I.R.S. in its ability to collect Caruana's taxes, [and therefore petitioner's] conviction --- under Section 371's defraud clause [is] unassailable." United States v. Hurley, supra at 2.

A reasonable interpretation of that quoted obiter dictum from petitioner's circuit court case is that petitioner could not have been convicted of violating 18 U.S.C. Sec. 371 unless the jury found "beyond a reasonable doubt [that petitioner had participated in the crime of money laundering], a fact necessary to constitute the crime with which he [was] charged." See In Re Winship, 397 U.S. 358, 364

But the crime of money laundering is not a fact necessary to, or an essential element of, petitioner's

conviction under 18 U.S.C. Sec. 371. See United States v. Pritchett, 908 F2d 816, 822, (11th Cir. 1990)

During the hearing before the Hearing Panel of the Board of Bar Overseers, Terence Troyer, the assistant Bar Counsel in charge of prosecuting the disciplinary case against petitioner asked the following question of petitioner who testified upon his own behalf:

> "Q. (By Mr. Troyer): Let me ask you the same hypothetical question that I asked the other attorneys. The First Circuit says the record contains sufficient evidence to conclude beyond a reasonable doubt that you knowingly participated in laundering drug proceeds hindering the I.R.S. in its ability to collect Caruana's taxes. What do you think an attorney who is convicted of that crime should be sanctioned?" (transcript of trial before Hearing Panel of Board of Bar Overseers, page 112)

Is that crime to which assistant bar counsel refers in the question asked of petitioner a "tax" crime or a "money laundering" crime?

Did the Supreme Judicial Court recognize of what specific "serious crime" petitioner was convicted under Supreme Judicial Court Rule 4:01, Sec. 12. In the Matter of Edmund M. Hurley, 418 Mass. 649, 653-655 (1994)(A. 11-13)

The Supreme Judicial Court states it does not have to decide of which crime petitioner was convicted:

> "Our short answer to this argument [by petitioner that he was convicted of a "tax offense"] is that the appropriate level of sanctions does not depend on the catch-phrase that might be used to describe the conduct on which those sanctions are grounded. It is irrelevant to us, and we assume it was to the single justice, whether the

> respondent's conduct could be labelled a 'tax offense' or 'money laundering'. Instead, we look at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases." (emphasis added) In the Matter of Hurley, 418 Mass. 649, 655 (A. 16)

Petitioner submits that the Supreme Judicial Court must accurately label the crime of which petitioner was convicted in order to arrive at the appropriate level of sanctions.

Petitioner was not before the Supreme Judicial Court because of his conduct, only because of his conviction. (See the Petition for Discipline which refers to petitioner's conviction as constituting the only actions which constitute violations of Disciplinary Rules 1-102(A)(4), (5) and (6). (A.28-

29) Petitioner is being sanctioned because of his conviction under 18 U.S.C. Sec. 371 in the United States District Court on April 19, 1990 (based on his conduct and the facts presented by the United States Attorney's office to a jury). Petitioner's conduct has been labelled, classified, named, tagged and assigned a catch-phrase, catchword, slogan or by word.

> Petitioner has been found guilty of conspiring with others "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department, an agency of the United States, in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana", i.e. a "tax offense." In the Matter of Edmund M. Hurley, supra, at 651 (f.n.3) (A. 6,7)

Can the Supreme Judicial Court look at the same facts and conduct of petitioner presented to the jury during petitioner's trial which ended on April 19, 1990 and assign another label or catch-phrase in "look[ing] at the sanctions imposed in factually similar cases ..."? In the Matter of Hurley, supra, at 655 (A. 14)

All the facts which the Hearing Panel of the Board of Bar Overseers and the Supreme Judicial Court considered about the "serious crime" of which petitioner was convicted on April 19, 1990 were presented at the trial of petitioner in the United States District Court for the District of Massachusetts. These same facts were put in the form of 62 specific overt acts included in Count One of Petitioner's indictment charging him

with a violation of 18 U.S.C. Sec.371. Add these to 103 other overt acts included in Count Two of the indictment accusing petitioner of racketeering, 18 U.S.C. Sec. 1962(d) of which petitioner was found not guilty by a jury. The jury, the District Court judge and the United States Court of Appeals for the First Circuit looked at these 165 overt acts and concluded that petitioner was guilty "solely [of] a charge of conspiracy to defraud the IRS in violation of 18 U.S.C. Sec. 371." United States v. Hurley, 957 Fed. 2d 1, 2 (1992)

The issue of what crime petitioner was convicted on April 19, 1990 has been determined in the United States District Court for the District of Massachusetts and the United States

Court of Appeals for the First Circuit. The Supreme judicial Court of Massachusetts is precluded from giving that crime another label or denying that "conspiracy to defraud the IRS" is a "tax offense."

"The general principle ... is that a right, question or fact distinctly put in issue and directly determined ... cannot be disputed in a subsequent suit ..." Southern Pac. R.R. v. United States, 168 U.S. 1, 48 (1897)

A definition of issue preclusion is set forth in Federal Practice and Procedure by Wright, Miller & Cooper, Sec. 4416 at 137, 138 (1981). The following highlighted phrases which, if not interupted by petitionor's comments and other citations, make one

complete sentence from Federal Practice and Procedure.

" --- **I. Issue preclusion arises in the second action on the basis of:**

I. a prior decision when the same 'issue' is involved in both actions ..."

Of what "serious crime" was petitioner found guilty on April 19, 1990? (A. 23),

Did the acts and conduct of petitioner amount to a violation of 18 U.S.C. Sec. 371 or some other statute like 18 U.S.C. Sec. 1956?

II. "The issue was 'actually litigated' in the first action"

There occurred a 29-day trial, ending on April 19, 1990, involving the issue of what crime petitioner was

guilty because of his conduct and the actions included in the overt acts of each count. (A. 23),

III. "After a full and fair opportunity for litigation;"

"Issue preclusion may be defeated by shifts in the burden of persuasion or by changes in the degree of persuasion required" Wright, Miller & Cooper, Federal Practice and Procedure,Sec. 4422 (1981)

The Board of Bar Overseers has eliminated any differences in the burden of persuasion from the criminal trial of petitioner and the disciplinary hearing by using, as the basis for such disciplinary hearing, the accustion that petitioner committed a "serious crime" as defined in Supreme Judicial Court Rule 4:01, Sec. 12(2) (A.27-29)]

IV. "the issue was 'actually decided' in the first action"

The jury did convict petitioner of committing the 'serious crime' of defrauding the IRS, 18 U.S.C. 371. (A. 23) The conviction in the United States District Court of April 19, 1990 became an actual final decision after the Supreme Court of the United States denied petitioner's writ of certiorari to the Court of Appeals for the First Circuit on October 4, 1992. In the Matter of Hurley, supra, at 651 (A. 6)

V. "by a disposition that is sufficiently 'final,' 'on the merits,' and 'valid'";

See United States v. Hurley, 957 Fed. 2d 1, cert. den. 113 S.Ct. 60, 121L.Ed 2d 28 "As described by the

doctrine of 'issue preclusion,' the relitigation of issues previously decided is barred on principles of finality and repose." DelMar Avionics, Inc. v. Quinton Instrument Co., 836 F.2d 1320, 1323-1324 (C.A. Fed.1987) citing Wright Miller & Cooper, Federal Practice and Procedure, Sec. 4402 at 10 (1981 ed.)

VI. "it was necessary to decide the issue in disposing of the first action,"

See Block v. Commissioners, 99 U.S. 686, 693 for the holding that, "... it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which is must necessarily have been founded"

VII. "and - in some decisions - the issue occupied a high position in the logical hierarchy of abstract legal rules applied in the first action "

"--- the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding." Restatement, Second, Judgments Sec. 28, comment j.

Petitioner had all the opportunity available to obtain a full and fair adjudication of the "serious crime" of which he was convicted, i.e. "solely on a charge of conspiracy to defraud the IRS." United States v. Hurley, supra, at 2;

VIII. "the later litigation is between the same parties or involves nonparties that are subject to the binding effect or benefit of the first action."

"A person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the term of his agreement." Restatement, Second, Judgments Sec. 40 In effect the Board of Bar Overseers is bound by Supreme Judicial Court Rule 4:01, Sec. 12 and has agreed to be bound by a determination of a court of competent jurisdiction (United States District Court) that an attorney (petitioner) who has come before that court has been found guilty of a specific crime 18 U.S.C. Sec. 371, a "tax offense".

IX. "the role of the issue in the second action was foreseeable in the first action, or it occupies a high position in the logical hierarchy of abstract legal rules applied in the second action;"

"There is a clear and convincing need for a new determination of the

issue ... (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action ..." Restatement, Second, Judgments Sec. 28 (5)(b). In petitioner's criminal proceeding in the United States District Court it was foreseeable that the Board of Bar Overseers would take action against petitioner because of Supreme Judicial Rule 402, Sec. 12.

X. "There are not special consideration of fairness, relative judicial authority, changes of laws or the like, that warrant remission of the ordinary rules of preclusion."

The element of fairness belongs to petitioner. It is only fair that twenty years of bar discipline being meted out to attorneys practicing in the courts of the Commonwealth of

Massachusetts be used to determine whether the judgment entered in petitioner's case before the Supreme Judicial Court "promotes even-handed results in such cases. In the Matter of Alter, 389 Mass. 153, 157 (1983) "Such cases," in petitioner's disciplinary matter, refers to "tax cases." Comparison of petitioner's indefinite suspension from the practice of law to those dispositions given to attorneys convicted of tax offenses shows a markedly disparate treatment of petitioner by the Supreme Judicial Court of the Commonwealth of Massachusetts. Twenty years of attorneys being disciplined in Massachusetts for violations of similar tax statutes as petitioner violated shows the maximum suspension to be two years versus petitioner's

minimum five year suspension. (see statement of the case, supra, at page 11)

The refusal of the Supreme Judicial Court to label the statute of which petitioner was convicted as a tax statute has resulted in that court "look[ing] at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases". In the Matter of Hurley, supra, at 655 (A. 14) The Supreme Court then proceeded to look at five attorney discipline cases which have one thing in common with petitioner's discipline case, namely that each of the attorneys were convicted of violating 18 U.S.C. Sec. 371. In the Matter of Hurley, supra, at 655, 656 (A. 14-17) But petitioner was convicted solely of

violating 18 U.S.C. Sec. 371. The five cases compared to petitioners by the Supreme Judicial Court involve, in addition to a conviction of 18 U.S.C. Sec. 371, convictions of a far more serious nature.

I. Matter of Knox, 412 Mass. 569, 570-571 (1992), the Supreme Judicial Court says "is helpful in our analysis here." In the Matter of Hurley, supra, at 655. (A. 16-17)

> "The indictment to which the attorney [Knox] pleaded guilty in the United States District Court for the District of Massachusetts charged one count of conspiracy [18 U.S.C. Sec. 371] and four counts of structuring currency violations, so called 'money laundering'" 412 Mass. 569 (1992)

The reference to "money laundering" in that case by the Supreme Judicial Court was to Knox's

four convictions of 31 U.S.C.Sec. 5322(b) and 31 U.S.C.Sec. 5324(b), each offense punishable by up to ten years imprisonment and up to $2,000,000 in fines. The sanction given Knox by the Supreme Judicial Court of "a suspension through the period of the attorney's probation" according to the same court was "not at all disparate." In the Matter of Knox, supra, at 571. Attorney Knox received a term of probation of three years from the United States District Court and thus a definite suspension from the practice of law of three years. This is the sanction which petitioner sought because of his sixteen months of probation (A. 26) and his sole conviction under U.S.C.. Sec. 371. (A. 23)

II Matter of Norton, 5 Mass. Att'y Discipline Rep. 272, 273 (1987) is another disciplinary case which the Supreme Judicial Court looked at for support that its "sanction imposed on the [petitioner] was not markedly disparate from that imposed in similar cases." In The Matter of Hurley, supra, at 655. (A. 18)

> Attorney Norton was "convicted of conspiracy to defraud the United States Department of Housing and Urban Development (HUD), making false material declarations before the Grand Jury, influencing, obstructing and impeding due process of justice and obstructing a witness in violation of 18 U.S.C.A Sec. 371, 1503, 1623 and 2". United States v. Norton, 755 F.2d 1428, 1429 (11th Cir. 1985)

For these serious crimes the Supreme judicial Court disbarred Norton and included in its opinion in

petitioner's case that Norton was convicted under 18 U.S.C. Sec. 371 "and another crime." The Supreme Judicial Court added a highly inappropriate quote from the single justice in the Knox case implying that petitioner was also guilty of committing the same (four) crimes: "these crimes involve misconduct by the attorney in connection with his practice of law. They are serious crimes concerned with lack of truthfulness." In the Matter of Hurley, supra, at 655. (A. 18)

Despite the sanction recommended by the hearing panel of the Board of Bar Overseers, this quote is included in its opinion:

> " They all agree in essence that [petitioner] is a person of honor and integrity, a lawyer whose word is his bond." (A. 41)

Petitioner was never accused in any of these proceedings of being untruthful. Attorney Norton was disbarred. Petitioner was suspended for an indefinite period. Both sanctions dictate that the attorney receiving either may not be reinstated until the expiration of at least five years. Supreme Judicial Court Rule 4:01, Sec. 18(1) Thus petitioner in effect received the identical sanction as Norton who was found guilty of four serious crimes punishable by fines up to $25,000 and up to 15 years in sentences. Petitioner's case is markedly disparate from Norton's and comparing the two does not promote the goal of "even-handed results in such cases." In the Matter of Alter, 389 Mass. 153, 157 (1983) (A.17, see

statement of the case supra, at 16, 17)

III. Matter of Lizotte, 6 Mass. Att'y Discipline Rep. 206, 206-207 (1990) is included in the Supreme Judicial Court's list of "similar cases". According to the report filed by the hearing panel of the Board of Bar Overseers in Lizotte,

> "Peter A. Lizotte, a member of the Massachusetts bar since 1980, was convicted on September 2, 1987, in the United States District Court for the District of Massachusetts on two counts of conspiracy to defraud the United States by impeding the Internal Revenue Service in the computation and collection of revenue in violation of 18 U.S.C. Sec. 371. He was sentenced to four years' imprisonment on each count, to be served concurrently, and was fined $15,000. See United States v. Lizotte, 856 F.2d 341 (1st Cir. 1988)

From the opinion and the sentence, it would appear that the District Court at least believed the facts and conduct in Lizotte were disparate from petitioner's case by a factor of eight. Attorney Lizotte must have agreed also since he offered his resignation in lieu of disbarment. The facts in Lizotte are not similar to petitioner's case. In addition Lizotte acknowledged that his conduct violated DR 1-102(A)(4) and (6). Petitioner strenuously objected to bar counsel adding violations of the same disciplinary rules to the Petition for Discipline solely because of the conviction. (see Statement of Facts, supra, at 2,3)

IV. Matter of Lucid, 6 Mass Att'y Disc. Rep. 210 is another case the Supreme Judicial Court found to be

similar to petitioner's because of attorney Lucid's conviction under 18 U.S.C. Sec. 371. In the Matter of Hurley, supra, at 656. (A. 19) Lucid is a much more serious example of attorney misconduct. Lucid was found guilty of 18 U.S.C.Sec. 371 plus attempting to evade income tax due to the IRS by filing false and fraudulent tax returns in behalf of his client in violation of 26 U.S.C. Sec. 7201 and 18 U.S.C. 2. According to the indictment in United States v. Lucid, 788 F. 2d 39 (1st Cir. 1986). Lucid caused the money derived from smuggling marijuana to go directly into his client trust fund account which Lucid expended for properties, goods and services which went into a corporation Lucid had formed. Petitioner did none of these acts.

Lucid was sentenced to one year imprisonment on each of his two felonies to be served concurrently and ordered to pay a fine in the amount of $10,000 and the costs of prosecution. In addition, Lucid had a prior informal admonition under DR 1-102A(4) involving dishonesty.

The Report and Recommendation of the Hearing Panel in petitioner's case stated:

> "We accept as fact, without reservation, Mr. Hurley's qualities as an attorney and acknowledge that, except for the Caruana episode, we all could have been proud of his performance." (A. 42)

V. Matter of Rogers, 7 Mass. Att'y Discipline Rep. 251 is the last case the Supreme Judicial Court compared to the facts of petitioner's case and concluded that it was factually similar. Attorney Rogers

was convicted under 18 U.S.C. Sec. 371, but in addition he was convicted of violating the racketeering statute 18 U.S.C. Sec. 1962(d), the same statute of which petitioner was found not guilty by the jury on April 19, 1990. This statute, 18. U.S.C. Sec. 1962(d) is punishable by not more than 20 years imprisonment and forfeiture provisions. The third crime of which Rogers was convicted is Aiding and Assisting in the preparation of a False Tax Return, 26 U.S.C. Sec. 7206 (2) punishable by a fine of not more than $100,000 or imprisonment of not more than 3 years or both, together with the costs of prosecution 26 U.S.C. Sec. 7206(5). Rogers pleaded guilty to offenses punishable by sentences of imprisonment up to 28

years and fines up to $110,500, forfeiture, and costs of prosecution.

Petitioner was found guilty of one count of violating 18 U.S.C. Sec. 371, punishable by confinement of not more than 5 years and $10,000 fine.

The counts to which Rogers pleaded guilty, excluding Count 20 (18 U.S.C. Sec. 371) all had as an essential element the fact of deriving money from illegal sources, i.e. drug importation and sale. None of the overt acts which made up petitioner's offense related to drug offenses in any way, nor in fact were any of the overt acts illegal per se.

This inappropriate and unfair comparison of petitioner!s case to the above five cases emphasizes the language of the Petition for Discipline filed against petitioner.

(A. 27-30) Paragraph 3 of the Petition identifies the crime of which petitioner was found guilty by quoting the language of the indictment and does not identify the statute 18 U.S.C. Sec. 371. Paragraph 5 states that "[c]onspiracy to defraud the United States is a serious crime as defined by Supreme Judicial Court Rule 4:01, Sec. 12(2)." (A. 28) Then paragraph 6 of the petition states:

> "The [petitioner's] actions constitute a violation of Canon One, Disciplinary Rules 1-102(A)(4), (5), and (6)." (A. 28,29)

> "These are the [Rules] that are customarily found to be violated by an attorney who was guilty." Assistant Bar Counsel on pages 16-17 of the transcript of hearing In Re John R. Jennings, supra at page 2, 3 (Statement of the Case, supra at page 2).

The Petition for Discipline must be read as describing petitioner's disciplinary offense as being the conviction of petitioner under 18 U.S.C. Sec. 371 and nothing else. The reference to paragraph 6 to "the[petitioner's] actions refers solely to the conviction of petitioner of a "serious crime" as defined by Supreme Judicial Court Rule 4:01, Sec. 12(2) (A. 28-29) Nowhere in the Petition for Discipline or the Rules of the Supreme Judicial Court, or in any Massachusetts disciplinary cases prior to In the Matter of Hurley is found a reference to the Board of Bar Overseers ability to "look at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases." In the

Matter of Hurley, supra, at 655. This new standard in the Hurley opinion allows the board of Bar Overseers to ignore the nature of the crime of which petitioner was convicted, i.e. 18 U.S.C. Sec. 371, a "tax offense". Applying this standard, the Board of Bar Overseers and the Supreme Judicial Court can sift through the facts and find the label that appeals to them or carefully avoid labelling petitioner's criminal offense so that the Board can compare it to cases like the five referred to by the Supreme Judicial Court which are markedly disparate from petitioner's case. In effect, petitioner is being put in jeopardy again on account of the same facts and conduct the jury sifted through for 29 days culminating in a guilty verdict under 18 U.S.C. Sec. 371. It is

petitioner's argument that the Board of Bar Overseers and the Supreme Judicial Court are precluded from denying that the crime of which petitioner was convicted on April 19, 1990 was a "tax offense" for the purpose of determining "whether the judgment is markedly disparate from those entered ... in similar cases." In the Matter of Alter, supra, at 157.

The process by which the Supreme Judicial Court compares prior disciplinary cases to petitioner's "must be by a standard which promotes even-handed results in such cases." In the Matter of Alter, ibid.

Conclusion

It is respectfully submitted that the Supreme Court of the United States should remand this petition for writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts with instructions that petitioner's conviction in the United States District Court for the District of Massachusetts on April 19, 1990 is a "tax offense" and (2) that petitioner's disciplinary case should be heard again before the Board of Bar Overseers of the Supreme Judicial

Court with instructions to compare petitioner's case with other "tax offense" cases.

Respectfully submitted,

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APPENDIX

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S-6384
S.J.C.

IN THE MATTER OF EDMUND M. HURLEY.

Suffolk, May 5, 1994. - September 12, 1994.

Present: Liacos, C.J., Wilkins, Nolan & Greaney, JJ.

Attorney at Law, Disciplinary proceeding, Suspension.

Information filed in the Supreme Judicial Court for the county of Suffolk on June 12, 1990.

The case was heard by Lynch, J.

Albert F. Cullen, Jr., for the respondent.
Terence M. Troyer, Assistant Bar Counsel.

LIACOS, C.J. The respondent, Edmund M. Hurley, appeals from an order of a single justice suspending him indefinitely from the practice of law in the Commonwealth. We consider whether indefinite suspension is the

appropriate sanction to impose on an attorney convicted of the felony of conspiracy to defraud the United States, in violation of 18 U.S.C. Sec. 371 (1988). We conclude that it is. Therefore, we affirm.

We summarize the facts underlying this disciplinary action as they were submitted to us in an information filed in the county court by the Board of Bar Overseers (Board). [1] The respondent was admitted to the bar of the Commonwealth on November 14, 1963. He began his practice with and later became partner of the firm Crane, Inker and Oteri. During his time at Crane, Inker and Oteri, the respondent became acquainted with one Salvatore

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1. The information incorporated the report of the hearing panel convened pursuant to S.J.C. Rule 4:01, Sec. 8 (2), as amended, 394 Mass. 1108 (1985).

"Mike" Caruana. In 1975, the respondent began a solo practice which he continued until 1981. From 1981 until the time of his temporary suspension by a single justice in 1992, the respondent represented Caruana in various civil matters.

The hearing panel made the following statement in its report:

> "Some of the business steered by Caruana to the Respondent involved loans being made from Bahamian interests to borrowers in New England. It was Mr. Hurley's duty to investigate their credit worthiness by checking on assets and available security, preparing documents and dealing with the

participants involved. He made at least eight trips to the Bahamas, sometimes flying with Caruana on his private plane. At times, he stayed at Caruana's home.

"Some of the transactions involved large amounts of cash being exchanged in his presence. On one occasion, $400,000.00 cash, in a silver suitcase, was exchanged for an interest in a hotel. On another occasion, a brown bag was passed . . . . alleged [to have] contained $25,000.00."

Caruana paid the respondent for his services but the respondent did not

participate in the illegal profits obtained by Caruana, [2] although he did enjoy certain other benefits, such as trips to the Bahamas.

The respondent was charged with various crimes in a fifteen-count indictment handed down by a Federal grand jury. United States v. Hurley, 957 F.2d 1 (1st Cir. 1992). All but two counts of the indictment were dismissed by a judge of the United States District Court. Id. at 2. The respondent was convicted by a jury on the count which had charged him with conspiracy to defraud the Internal Revenue Service in violation of 18

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2. Caruana allegedly was a drug smuggler. He was indicted along with the respondent but remains a fugitive from justice.

U.S.C. Sec. 371. [3] His conviction was affirmed by the United States Court of Appeals for the First Circuit, id. at 8, and the United States Supreme Court denied his petition for writ of certiorari. Hurley v. United States, 113 S. Ct. 60 (1992). The respondent was incarcerated for five months and placed on probation until February, 1994.

Bar counsel filed a petition for discipline with the Board in June,

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3. The indictment read:

"Beginning no later than October 31, 1978 and continuing until at least April 1987, at Boston, Brookline, Peabody, Plymouth, Rockland, Newton, and elsewhere in the District of Massachusetts; . . . and at other locations . , [the respondent and six others], defendants herein, did knowingly, willfully and intentionally combine, conspire, confederate and agree, with each other and with other persons known and unknown to the grand jury, . . . to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the

1990. All proceedings were stayed pending the resolution of the respondent's appeal of his Federal conviction. The respondent was temporarily suspended from the practice of law by a single justice of this court on June 5, 1992. Later, a hearing panel of the Board was convened and a hearing was held on January 5, 1993. The hearing panel's report, dated February 22, 1993, recommended to the Board that the respondent be indefinitely suspended from the practice of law in the Commonwealth. At a meeting of the

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3. (continued) functions of the Internal Revenue Service of the Treasury Department, an agency of the United States, in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana."

Board on April 12, 1993, attended by ten members of the Board, the Board voted, by a unanimous vote of five members present and voting, [4] to adopt the report and recommendation of the hearing panel to file an information in the county court.

The Board filed an information in the county court, alleging, through adoption of the hearing panel report, that the conduct of the respondent constituted violations of S.J.C. Rule 3:07, Canon 1, DR 1-102 (A) (4), (5), (6), as appearing in 382 Mass. 769-770 (1981). The information also notified this court that the respondent had been convicted of a serious crime as

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4. The five other members present abstained from the vote.

defined by S.J.C. Rule 4:01, Sec. 12 (2), 365 Mass. 705 (1974). [5] Presumably in mitigation, the Board, again through its adoption of the hearing panel report, described several factors: the respondent was an ideal husband and father, especially in light of his wife's special needs; he had been a diligent, hard working, caring, competent and otherwise ethical attorney for twenty-five years; he had overwhelming favorable character references from several relatives, attorneys, clients and friends.

Based on the information and record of proceedings submitted to the

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5. The respondent concedes that his conviction under 18 U.S.C. Sec. 371 is a conviction of a serious crime for the purposes of S.J.C. Rule 4:01, Sec. 12, 365 Mass. 704 (1974), and that some period of suspension is appropriate.

court, the single justice issued an order suspending the respondent indefinitely from the practice of law in the Commonwealth retroactive to his temporary suspension in June, 1992. The order of the single justice provided that the respondent could become a paralegal on the completion of his term of probation. The respondent filed this appeal.

The primary issue we decide is whether the sanction imposed by the single justice on the respondent is markedly disparate from the sanctions imposed in similar cases. Matter of Palmer, 413 Mass. 33, 37-38 (1992). Matter of Neitlich, 413 Mass. 416, 421 (1992). The respondent makes a threefold argument in favor of reducing his period of suspension to a definite period of time ending at the

same time as his probation ended. He argues that his conviction was for "strictly a tax offense" and should be compared to other "tax offense" cases; that the prosecutor's, the trial judge's and the First Circuit Court of Appeals' reliance, during the Federal criminal proceedings, on the phrase "money laundering" was inappropriate and tainted these disciplinary proceedings; and that evidence which may have been relevant to the counts of the indictment on which he was not convicted, but which was not relevant to the count on which he was convicted, should not have been considered in the disciplinary proceeding. The respondent also argues that his conviction of a violation of 18 U.S.C. Sec. 371 does not constitute per se a violation of

S.J. C. Rule 3:07, Canon 1, DR 1-102 (A) (4), (5), (6). [6]

We consider first the respondent's argument regarding the use of the phrase "money laundering." We recognize that both the United States District Court and the Court of Appeals for the First Circuit judges used "money laundering" to describe the activity which the respondent .assisted. See, e.g., Hurley, 957 F.2d at 2. We need not consider here the appropriateness of the use of that

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6. The respondent argues that the vote of the Board to file an information was void because, although ten members of the Board were present at the meeting when the vote occurred, only five members voted, the others having recused themselves. Since we are reviewing the appropriateness of the order of the single justice, we need not consider asserted errors occurring during the proceedings of the Board.

phrase in the criminal proceeding. Any grievance the respondent may have had in that proceeding has been raised unsuccessfully in the Federal courts and we have no basis to reconsider such arguments. Our concern here is only in regard to the disciplinary proceeding resulting in the order of indefinite suspension imposed by the single justice.

The respondent has not directed us to any reference in the proceedings before the single justice or before

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6. (continued) In the interest of removing any doubt which may exist, however, we note that S.J.C. Rule 4:01, Sec. 5 (2), as amended, 411 Mass. 1315 (1991), provides in pertinent part, that "[t]he Board shall act only with the concurrence of a majority of the Board who are present and voting provided, however, that a quorum . . . shall be constituted of a majority of the Board" (emphasis added). This

the Board to "money laundering." [7] Our review of the record, including the information and the report of the hearing panel, discloses that there were a few references to the allegation that Caruana "launder[ed]" the profits of his drug trade. The references to the conduct of respondent, however, were phrased in the language of the indictment. In

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6. (continued)language is clear that a meeting of the Board may be convened only when a majority of the Board's members are present, but the Board may take action at a duly convened meeting with a vote of less than a majority of the total members of the Board: only a majority of Board members who are both present and voting is required. To conclude otherwise would render the Board powerless to act in cases where several of the Board's members find it necessary to recuse themselves from a particular vote.

7. The references in the respondent's brief discussing the money laundering issue refer to the respondent's petition for writ of certiorari to the United States Supreme Court, not to any proceeding before the single justice or the Board.

his brief, bar counsel argues that respondent's conduct appropriately was characterized as assisting the laundering of money. Nevertheless, we do not believe, as the respondent argues, that the Board and single justice based their recommendation and imposition, respectively, of sanctions on some theory of "money laundering". The respondent simply has not shown that the Board and the single justice relied on anything other than the wording of the indictment and the language of the statute under which the respondent was charged, as well as on the factual background that we have set forth.

We turn to the respondent's argument that we should consider only "tax offenses" in deciding whether the

disciplinary sanction imposed on him was markedly disparate from the sanction imposed by other single justices in similar cases. Our short answer to this argument is that the appropriate level of sanctions does not depend on the catch-phrase that might be used to describe the conduct on which those sanctions are grounded. It is irrelevant to us, and we assume it was to the single justice, whether the respondent's conduct could be labelled a "tax offense" or "money laundering." Instead, we look at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases.

This court's decision in Matter of Knox, 412 Mass. 569, 570-571 (1992), is helpful in our analysis

here. In Knox, we observed that fifty-five disciplinary cases involving attorneys convicted of felonies had arisen since our decision in Matter of Alter, 389 Mass. 153 (1983). Knox, supra at 570-571. Of those fifty-five attorneys, thirty-eight either were disbarred or resigned in lieu of disbarment. Id. at 570-571 nn.1, 2, 3. Thus, respondent received a more lenient sanction than did 69% of the attorneys convicted of felonies referred to in Knox, supra.

Our task is to compare similar cases to this case and see if the sanction imposed here is markedly disparate. Palmer, supra at 37-38. Neitlich, supra at 421. We need not endeavor to find perfectly analogous cases, nor must we concern ourselves

with anything less than marked disparity the sanctions imposed. Under this standard, we need go no further than Knox, supra at 570-571, to conclude that indefinite suspension was appropriate in this case. Nevertheless, we take note of the following cases which further support our conclusion that the sanction imposed on the respondent was not markedly disparate from that imposed in similar cases: Matter of Norton, 5 Mass. Att'y Discipline Rep. 272, 273 (1987) (disbarment after conviction for conspiracy to defraud the United States and another crime. "These crimes involve misconduct by the attorney in connection with his practice of law. They are serious crimes concerned with lack of truthfulness"); Matter of Lizotte, 6

Mass. Att'y Discipline Rep. 206, 206-207 (1990) (resignation after conviction for conspiracy to defraud the United States by impeding the Internal Revenue Service; attorney acknowledge that conduct violated DR 1-102 (A) (4) and (6)); Matter of Lucid, 6 Mass. Att'y Discipline Rep. 210, 211-213 (1990) (indefinite suspension after conviction for conspiracy to defraud the United States and filing a false tax return for a client; court noted that crime was committed in connection with attorney's practice of law); Matter of Rogers, 7 Mass. Att'y Discipline Rep. 251, 251-252 (1991) (disbarment after conviction for conspiracy to defraud the United States and other crimes stemming from establishment of "shell corporations" in Virgin Islands and

involving profits from illegal drug trade).

The respondent's third argument, that this disciplinary action should not have been based on factual allegations relating to the fourteen counts on which respondent was not convicted, bears quick disposition. Our review of the record reveals that the disciplinary proceedings focused only on the respondent's conviction for a violation of 18 U.S.C. Sec. 371, and his conduct underlying that conviction.

The respondent's final argument is that a conviction under 18 U.S.C. Sec. 371 is not, per se, a violation of DR 1-102 (A) (4), (5, (6). [8] The respondent goes on to argue, citing cases we need not discuss, that the term "defraud" as used in 18 U.S.C.

Sec. 371 does not really connote fraud, deceit or dishonesty.

In Norton, supra, Lizotte, supra, Lucid, supra, and Rogers, supra, the single justices variously suggested that the crime of which the respondent here was convicted involved untruthfulness and that the attorneys' unlawful conduct, arising in connection with the practice of law, warranted severe sanctions. Thus, when we consider the respondent's

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8. Supreme Judicial Court rule 3:07, Canon 1, DR 1-102 (A) (4), (5), (6), as appearing in 382 Mass. 769-770 (1981), provides:

"(A) A lawyer shall not: . . .

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

conviction, we cannot agree that the attorney has not violated at least DR 1-102 (A) (4) and (6).

More importantly, however, we note that the respondent does not suggest what difference it would make even if we were to agree with his argument. Conviction of a serious crime, even if it did not constitute a violation of DR 1-102 (A) (4), (5), (6), would warrant the imposition of sanctions. See S.J.C. Rule 4:10, Sec. 12.

We conclude that the single justice appropriately suspended the respondent indefinitely from the practice of law. Accordingly, we affirm the order the single justice.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA V. EDMUND M. HURLEY	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCE REFORM ACT
(Name of Defendant)	Case Number CR 89-68-H-01

ALBERT F. CULLEN, JR, ESQ.
Defendant's Attorney

THE DEFENDANT:

was found guilty on count ONE after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count No.
18 U.S.C. 371	Conspiracy to defraud the United States	One

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XX the mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc.Sec. No.
004-32-8806

July 9, 1990
Date of Imposition of Sentence

Defendant's Mailing Address:

54 Cottage Street
Brookline, MA 02146

/s/
Signature Judicial Officer

Edward F. Harrington, USDJ
Name & Title of Judicial Officer

Defendant's residence address: Same

July 10, 1990
Date

Defendant: EDMUND M. HURLEY
Judgment - Page 2 of 5
Case Number: CR 89-68-H-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of
TWO YEARS, FIRST EIGHT MONTHS TO BE SERVED; BALANCE SUSPENDED AND A PERIOD OF PROBATION OF SIXTEEN MONTHS. **

** EXECUTION OF TERM OF IMPRISONMENT STAYED PENDING APPEAL.

Defendant: EDMUND M. HURLEY
Case Number: CR 89-68-H-01

PROBATION

The defendant is hereby placed on probation for a term of SIXTEEN MONTHS.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

(NONE)

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner vs. EDMUND M. HURLEY, ESQ. Respondent	:	BBO File No. C1-90-208

PETITION FOR DISCIPLINE

1. This petition is brought pursuant to Rule 4:01, Section 8(2), of the Rules of the Supreme Judicial Court and Sections 3.13(2) and 3.14 of the Rules of the Board of Bar Overseers.

2. The respondent, Edmund M. Hurley, Esquire, is an attorney duly admitted to the Bar of the Commonwealth on November 14, 1963.

3. On or about April 19, 1990, a jury sitting in the United States

District Court for the District of Massachusetts found the respondent guilty of willfully and intentionally conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation and collection of income taxes owed by Salvatore M. Caruana.

4. The jury found that the conspiracy of which the respondent was guilty began no later than October 31, 1978 and continued until at least April 1987.

5. Conspiracy to defraud the United States is a serious crime as defined by Supreme Judicial Court Rule 4:01, section 12(2).

6. The respondent's actions constituted a violation Canon One,

Disciplinary Rules 1-102(A)(4), (5), and (6), which are set out below.

CANON ONE

A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

WHEREFORE, the Bar Counsel requests that the Board of Bar Overseers;

1. Consider and hear the matter set forth herein.

2. Determine that discipline of the said Edmund M. Hurley, Esquire is required.

3. File an Information concerning these matters with the Supreme Judicial Court.

DANIEL KLUBOCK
BAR COUNSEL

By: /s/Terence M. Troyer
Terence M. Troyer
BBO#503200
Assistant Bar Counsel
75 Federal Street
Boston, MA 02110
(617) 357-1860

Dated this 12th day of June, 1990.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL Petitioner	)	
vs.	)	BBO File No. C1-90-208
EDMUND M HURLEY Respondent	)	

AFFIDAVIT OF COMPLIANCE

I, Edmund M. Hurley, having been duly sworn hereby state as follows:

1. I have notified each one of my clients that I have agreed to a temporary suspension from the practice of law effective Thursday, May 14, 1992.

2. Future correspondence concerning this matter may be sent to me in care of my former law partner,

Ronna D. Howard, at 7 Liberty Square, Boston, MA 02109 or to my home address at 54 Cottage Farm Road, Brookline, MA 02146.

Signed under the pains and penalties of perjury.

/s/ Edmund M. Hurley
Edmund M Hurley

The Commonwealth of Massachusetts
Supreme Judicial Court
for Suffolk County
1404 Courthouse
Boston, Massachusetts 02108

June 8, 1992

Albert F. Cullen, Jr., Esquire
Cullen & Butters
160 Federal Street
Boston, MA 02110

RE: No. BD-90-022

IN RE: Edmund M. Hurley

NOTICE OF DOCKET ENTRY

You are hereby notified that on June 5, 1992, the following was entered onto the docket of the above referenced case:

Order temporarily suspending respondent pending further proceedings before the B.B.O. and until further order of this Court. (Lynch, J.)

Richard J. Rouse
Clerk

To: Albert F. Cullen, Jr., Esquire
Terence McBride Troyer, Assistant Bar Counsel
Arnold Rosenfeld, Bar Counsel
Michael Fredrickson, Board Counsel

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner	)	
v	)	B.B.O. File No.
EDMUND M. HURLEY, ESQ. Respondent	)	C1-90-208

REPORT AND RECOMMENDATION OF THE HEARING PANEL

FINDINGS OF FACT

The Respondent, Edmund M. Hurley, Esquire, is an attorney duly admitted to the Bar of the Commonwealth on November 14, 1963.

On April 19, 1990, Mr. Hurley was convicted of conspiring to defraud the United States, by knowingly helping a drug smuggler conceal his profits from the Internal Revenue Service. The conviction was based on the general conspiracy statute (18 U.S.C. Sec.

371). Mr. Hurley was charged with conspiring with one Salvatore "Mike" Caruana ("Caruana"), a highly successful drug smuggler, who earned millions of dollars from the unlawful importation and distribution of marijuana and hashish from 1978 to 1981 and avoided paying taxes by laundering the profits until at least April 1987. (See Ex. 3-D41; United States v. Hurley, 957 F.2d 1 1st Cir. 1992, affirming conviction, cert. denied 61 U.S. Law Week 3256; also see Ex. 1)

After his conviction, Mr. Hurley was incarcerated for five months and is on probation until February 1994.

These proceedings arise out of that conviction.

The Respondent commenced the practice of law with the firm of

Crane, Inker and Oteri ("Crane"). The firm took on both criminal and civil litigation. Mr. Hurley was primarily engaged on the civil side of the aisle, which literally physically divided the practice.

In the middle 1960s, while not yet a partner, Mr. Hurley was on vacation sailing the waters off Nantucket, when Caruana needed legal advice on a civil matter. The senior partner, responsible for Caruana's business, remained on vacation while Mr. Hurley flew back to Danvers with Caruana to represent him at trial. This commenced a long and friendly association with Caruana, much closer than that of attorney - client.

Mr. Hurley left the Crane firm in 1975 and, while loosely associated with other attorneys, was basically a

sole practitioner until 1981. From 1981 until temporarily suspended on May 14, 1992, he was associated with Attorney Ronna Howard. [1] He brought Caruana's business with him in 1975 and this involved frequent civil litigation matters involving Caruana, his family and friends. Attorney Oteri continued to represent Caruana on criminal matters.

Some of the business steered by Caruana to the Respondent involved loans being made from Bahamian interests to borrowers in New England. It was Mr. Hurley's duty to investigate their credit worthiness by checking on assets and available

---

1. His association with Mrs. Howard is later described.

security, preparing documents and dealing with the participants involved. He made at least eight trips to the Bahamas, sometimes flying with Caruana on his private plane. At times, he stayed at Caruana's home.

Some of the transactions involved large amounts of cash being exchanged in his presence. On one occasion, $400,000.00 cash, in a silver suitcase, was exchanged for an interest in a hotel. On another occasion, a brown bag was passed, which one Arnie Katz later alleged contained $25,000.00.

Mr. Hurley testified that he did not know Caruana was a drug dealing money launderer until after their relationship was severed. We find an attorney would have had to studiously avoid newspapers, television and the movies totally for the past twenty-five years to have missed the threads that tie such an operation together.

Cash money, big deals, private planes, Bahama sojourns and Arnie Katz would lead even a novice at the Bar to suspect he was involved in matters that could not bear scrutiny from law enforcement officials.

The evidence was sufficient for the jury to find the Respondent was guilty of violating 18 U.S.C. Sec. 371 and he does not dispute that conviction in these proceedings.

The issue is really one to determine the proper discipline to be recommended.

The evidence is undisputed that Mr. Hurley has always been and continues to be a loving and devoted husband and father. His wife, Patricia, has suffered from severe mental illness, diagnosed as schizo-affective disorder or Bipolar

Disorder, Manic, with psychotic features. At times, she has been a danger to herself and others and has been confined to locked psychiatric facilities on numerous occasions. Her illness was first diagnosed in 1966. Her actions have been frequently bizarre and embarassing. Mr. Hurley has done his best to contend with these problems and also continue to provide parental support to his three children, all of whom were educated at costly institutions of higher learning. Dianne Hurley Young (age 30), Edmund P. Hurley, Esq. (age 28) and John M. Hurley (age 26) have all written glowing tributes to his dedication to and love of family. Two sisters (Patricia and Joan) and his cousin Leo A. Reed, Esq. have written to confirm his dedication.

We accept as fact, without reservation, the Mr. Hurley has been an ideal husband and father under circumstances that would try the patience of Job.

Further, we find that Mr. Hurley has been a diligent hardworking, caring attorney who has competently and ethically represented his clients for over twenty-five years. A long list of attorneys have written in support of Mr. Hurley. (See Ex. 2 - letters 8 through 17) They all agree in essence that he is a person of honor and integrity, a lawyer whose word is his bond. He was a tough, but fair attorney, well respected by the Bar.

We accept as fact, without reservation, Mr. Hurley's qualities as an attorney and acknowledge that,

except for the Caruana episode, we all could have been proud of his performance. We are supported in this proposition by the testimony of Katherine G. Welch (former client), Priscilla J. Conant (former client and present director of claims administration at the I.A.B.), Attorney Robert Harrington (adversary at times, co-counsel at times), Attorney Timothy White (co-tenant in law office for several years, co-counsel on occasion, young attorney who learned from Mr. Hurley) and Attorney Ronna Howard (young attorney and mother of two small children who worked for and later was a partner with Mr. Hurley since 1981 and until his temporary suspension). They were all very supportive of Mr. Hurley at the hearing.

Mrs. Howard gave birth to both children while associated with Mr. Hurley. They shared a two-room office, one for the secretary and one for them. After giving birth, her first child was brought to the office for seven months and the second child for six months. Mr. Hurley never complained and, in fact, helped with the baby at times.

There was also testimony from both Mr. Hurley and Mrs. Howard that he had a drinking problem. While we do not find that he was an alcoholic and we find he was not in need of formal treatment, he did drink rather heavily from at least 1975. He frequently drank during the work day and in the early 1980's had a refrigerator in his office stocked with beer. Mrs. Howard drank with him

for a period of time and decided to stop before he did. His judgment may have been affected at times, but his drinking is only an incidental factor in the Caruana matter. To his credit, Mr. Hurley decided to give it up and has not had a drink since May 1985.

Mr. Hurley was paid for the services he rendered to Caruana and the interests he represented which were Caruana directed. There were fringe benefits also, such as the Bahama trips. He did not participate otherwise in the illegal profits gained from drug smuggling and money laundering.

We do find the Mr. Hurley was under continuous stress from at least 1975 (and probably before that date) because of his wife's serious illness, the need to care for and see to his

children's education without her help, and a law practice that never generated enough income to make him feel economically comfortable to any extent.

DISPOSITION

We find that Mr. Hurley has been convicted of a serious crime as defined by Supreme Judicial Court Rule 4:01, section 12(2).

We find that he has violated Canon One, D.R. 1-102(A)(4),(5) and (6). (See .full text in Appendix.)

We believe that the Respondent's conduct is not as egregious as that found in Matter of Rogers, SJC No. 91-9BD, 9/26/91. We believe that the facts in this case are closest to those found in Matter of Lucid, 6 Mass. Att'y Disc. R 210 (1990).

We unanimously recommend to the Board of Bar Overseers that Mr. Hurley be indefinitely suspended from the practice of law retroactive to May 15, 1992.

Respectfully submitted,

/s/ John A. Wickstrom
John A. Wickstrom

/s/ Michael E. Mone KDO)
Michael E. Mone

/s/ Francis J. Bresnahan
Francis J. Bresnahan

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Hearing Panel report of the Board of Bar Overseers, in the matter of Bar Counsel, Petitioner vs. Edmund M. Hurley, Respondent by Certified Mail, Return Receipt Requested, and his counsel, Albert F. Cullen, Jr. by first class mail, and delivered in hand a copy to Bar Counsel, Arnold R. Rosenfeld and Assistant Bar Counsel, Terence M Troyer.

Dated this 22nd day of February 1993.

BOARD OF BAR OVERSEERS

By:

/s/ Marie Jo Luc
Marie Jo Luc
Administrative
Assistant

Board of Bar Overseers
of the Supreme Judicial Court
75 Federal Street
Boston, Massachusetts 02110
617/357-1860
Fax: 617/357-1872

In accordance with the Rules of the Board of Bar Overseers, Section 3.53, at its meeting held April 12, 1993, the Board of Bar Overseers considered Report and Recommendation of the Hearing Panel; Brief of the Respondent on appeal from and Objection to the Report of the Hearing Panel dated February 22, 1993 with Exhibit A; Bar Counsel's Brief in Opposition to Respondent's Appeal; Respondent's Motion to Strike Bar Counsel's Brief; Petition for Discipline; and the United States Court of Appeals' Decision in re Edmund M. Hurley (C1-90-208).

After consideration and upon Motion duly made and seconded, it was unanimously

VOTED: to strike as untimely Bar Counsel's brief in opposition to respondent's appeal.

After further consideration and upon new Motion duly made and seconded, it was unanimously

VOTED: adopt the Hearing Panel's report and its recommendation to file

an Information with the Supreme Judicial Court recommending that Mr. Hurley be indefinitely suspended from the practice of law retroactive to the date of his temporary suspension.

(Mr. Wickstrom, Mr Mone, Mr. Bresnahan, Ms. Berry, & Ms. Gargiulo recused themselves from the discussion and votes.)

/s/ Janis M. Berry
Janis M. Berry
Secretary pro tem

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 90-22BD

IN RE: EDMUND M. HURLEY, ESQUIRE

INFORMATION

To the Honorable Chief Justice and the Justices of the Supreme Judicial Court:

1. The Board of Bar Overseers, pursuant to Rule 4:01, section 8 (3) of the Rules of this Court, brings to the attention of this Court matters regarding the character and conduct of Edmund M. Hurley, Esquire, who was duly admitted to practice before the Courts of the Commonwealth on November 14, 1963. On June 5, 1992, Respondent was temporarily suspended by a Justice of the Supreme Judicial Court.

I. Statement of the Facts

2. The facts of this case are stated in the Report of the Hearing Panel which is attached hereto and incorporated by reference herein.

II. Proceedings

3. The Bar Counsel commenced disciplinary proceedings before the Board of Bar Overseers by the filing and service of a Petition for Discipline on June 12, 1990.

4. Between July, 1990, and January, 1993, all proceedings were deferred at Respondent's request pending appeal of his conviction. Respondent's initial motion for deferral was filed on July 11, 1990, and allowed the following day. In February, 1992, Bar Counsel's Motion to Terminate Deferral was allowed, following issuance of a mandate from

the United States Court of Appeals for the First Circuit. On July 3, 1992, Respondent requested a further delay in hearing because a Petition for Writ of Certiorari was pending in the Supreme Court of the United States and Respondent was then incarcerated. This request was allowed.

5. One day of hearing was held on January 5, 1993, before the Hearing Panel. On that date, Bar Counsel filed a Memorandum on Disposition, recommending disbarment.

6. On January 25, 1993, the Respondent filed a Memorandum in Opposition to Recommended Disposition.

7. On February 22, 1993, the Hearing Panel filed their report, which recommended an indefinite suspension.

8. On March 12, 1993, the respondent filed a brief appealing from the Hearing Panel's report. Bar Counsel renewed his recommendation for disbarment in a Brief in Opposition to Respondent's Appeal, which was filed on March 25, 1993.

9. On March 31, 1993, Respondent's counsel filed a Motion to Strike Bar Counsel's Brief.

10. On April 12, 1993, the Board of Bar Overseers voted:

> to strike as untimely Bar Counsel's brief in opposition to respondent's appeal.
>
> to adopt the Hearing Panel's report and its recommendation to file an Information with the Supreme Judicial Court recommending that Mr. Hurley be indefinitely suspended from the practice of law retroactive to the date of his temporary suspension.

III. Costs

The following amounts were expended by the Board in furtherance of the disciplinary proceedings in this matter:

Stenographer	$488.25
Photocopying	$ 55.75
Mailing Costs	$ 4.58
TOTAL	$ 548.58

IV. Conclusion

The Board of Bar Overseers respectfully brings the foregoing to the attention of this Honorable Court for such action as the Court deems necessary. The entire record of these proceedings is annexed hereto and made a part hereof.

Respectfully submitted,

/s/ Michael Fredrickson
Michael Fredrickson
Board Counsel

Dated this 4th day of May, 1993.

RECORD OF PROCEEDINGS
In Re: Edmund M. Hurley, Esq.

1. Petition for Discipline
   Filed June 12, 1990

2. Respondent's Motion for Deferral
   Filed July 11, 1990

3. Deferral Allowed
   July 12, 1990

4. Bar Counsel's Motion to terminate
   Deferral
   February 21, 1992

5. Letter from Respondent's Counsel
   Filed July 3, 1992

6. Motion to Continue Hearing
   Allowed
   July 6, 1992

7. Transcript of Hearing
   January 5, 1993

8. Bar Counsel's Memorandum on
   Disposition
   Filed January 5, 1993

9. Respondent's Memorandum in
   Opposition to Recommended
   Disposition
   Filed January 25, 1993

10. Hearing Panel Report
    Filed February 22, 1993

11. Respondent's Brief in Opposition to Panel Report
Filed March 12, 1993

12. Bar Counsel's Brief in Opposition to Respondent's Appeal
Filed March 25, 1993

13. Respondent's Motion to Strike Bar Counsel's Brief
Filed March 31, 1993

14. Vote of the Board of Bar Overseers
April 12, 1993

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: 90-022 BD

IN RE: EDMUND M. HURLEY

ORDER

This matter came before the Court, Lynch, J. presiding on an Information and Record of Proceedings filed on May 4, 1993. On June 5, 1992, it was ordered and adjudged that the respondent be suspended from the practice of law until further proceedings before the Board of Bar Overseers or until further order of this Court.

It is further ORDERED and ADJUDGED

(1) the respondent be indefinitely suspended from the practice of law in the Commonwealth of

Massachusetts; retroactive to June 5, 1992, the date of temporary suspension;

(2) the respondent be allowed to become a paralegal upon the completion of his term of probation imposed by the United States District Court for the District of Massachusetts;

By the Court, (Lynch, J.)

/s/ Maura Sweeney Doyle
Assistant Clerk

Entered: August 30, 1993

A True Copy
Attest: /s/ Maura Sweeney Doyle
9-2-93 Date Assistant Clerk

The Commonwealth of Massachusetts
Supreme Judicial Court
for Suffolk County
1404 Courthouse
Boston, Massachusetts 02108

September 2, 1993

Albert F. Cullen, Jr., Esquire
Cullen & Butters
160 Federal Street
Boston, MA 02110

Re: No. BD-90-022

IN RE: Edmund M. Hurley

NOTICE OF DOCKET ENTRY

You are hereby notified that on August 30, 1993, the following was entered onto the docket of the above referenced case:

ORDER: . . . "it is further ORDERED and ADJUDGED the respondent be indefinitely suspended from the practice of law in the Commonwealth of Massachusetts; retroactive to June 5, 1992, the date of the temporary suspension; the respondent be allowed to become a paralegal upon the completion of his term of probation imposed by the United States District

Court for the District of
Massachusetts filed.

/s/ Richard J. Rouse
Richard J. Rouse,
Clerk

To: Albert F. Cullen, Jr., Esquire
Terence McBride Troyer,
Assistant Bar Counsel
Arnold R. Rosenfeld, Bar
Counsel
Michael Fredrickson, Board
Counsel

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss **Supreme Judicial Court for Suffolk County No. 90-022BD**

IN RE: Edmund M. Hurley

NOTICE OF APPEAL

Notice is hereby given that Edmund M. Hurley, respondent above named, hereby appeals to the Supreme Judicial Court from the order entered by the Court, Lynch, J., indefinitely suspending the respondent from the practice of law in the Commonwealth of Massachusetts; retroactive to June 5, 1992, entered in this action on August 30, 1993.

Edmund M. Hurley,
Respondent
By his attorney:

/s/ Albert F. Cullen, Jr.
Albert F. Cullen, Jr.
Cullen & Butters
One Beacon Street
Boston, MA -02108
(617) 367-2600

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts
02108
(617) 557-1020

Albert F. Cullen, Jr., Esquire
Cullen & Butters
One Beacon Street
13th Floor
Boston MA 02108

RE: No. SJC 06384

IN RE: EDMUND M. HURLEY

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: November 2, 1994

To: Albert F. Cullen, Jr., Esquire
Terence McBride Troyer, Esquire
Michael Fredrickson, Esquire

Constitution of the United States

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other state.

18 U.S.C. Sec. 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. Sec. 1341

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. Sec. 1956

Laundering of Monetary Instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of

some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of unspecified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part -

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under state or Federal law,

shall be sentenced to a fine or not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years or both.

26 U.S.C. Sec. 7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the

case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Sec. 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "5 years" for "1 year".

Mass. General Laws, c.62C, Sec. 73

Tax evasion, failure to collect or pay tax, keep records or supply information; penalties

(a) Any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the statutes referred to in section two or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than one hundred thousand dollars or five hundred thousand dollars in the case of a corporation, or by imprisonment for not more than five years, or both, and shall be required to pay the costs of prosecution.

26 U.S.C. Sec. 7206

Frauds and False Statements

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under the internal revenue laws, of a return, affidavit claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud

is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; or

(3) Fraudulent bonds, permits, and entries. Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulenly executed, or advises, aids in or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully-

(A) Concealment of property. - Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. - Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the cast of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Supreme Judicial Court Rule 3:07
DR 1-102 (A) (4), (5) and (6)

(A) A lawyer shall not:
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Rule 4:01

Section 12. Attorneys Convicted of Serious Crimes.

(1) Upon the filing with this court of a certificate establishing that an attorney has been convicted of a serious crime as hereinafter

defined, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, this court shall enter an order to show cause why the attorney should not be immediately suspended from the practice of law, regardless of the pendency of an appeal, pending final disposition of any disciplinary proceeding commenced upon such conviction. The court or a justice, after affording the attorney opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate.

(2) The term "serious crime" shall include (a) any felony, and (b) any lesser crime (involving conduct for an attorney demonstrating unfitness to practice as a lawyer), a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, wilful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit a "serious crime."

Rule 4:01

Section 18. Reinstatement.

(1) Except as the court by order may direct, an attorney who has been disbarred or suspended for an indefinite period, or whose resignation has been allowed under

Section 15 of this Rule, may not be reinstated otherwise than upon his petition filed in this court after the expiration of at least five years from the effective date of the order of disbarment, suspension or allowance of resignation.

* * *

Supreme Court, U.S.
FILED
MAR 1 - 1995
CLERK

No. 94-1318

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1994

IN THE MATTER OF

EDMUND M. HURLEY

BRIEF IN OPPOSITION TO CERTIORARI

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Boston, MA 02110
(617) 357-1860

March 3, 1995

BEST AVAILABLE COPY

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QUESTION PRESENTED FOR REVIEW

This petition presents no federal question for review.

The sole question presented to the court below was a question of state law, namely the proper sanction to be imposed on a Massachusetts attorney who has been convicted of a federal felony.

STATEMENT OF THE CASE

The Petitioner, Edmund M. Hurley, is an attorney admitted to practice before the courts of the Commonwealth of Massachusetts. (App. 2) In July, 1990, he was convicted of the felony of conspiracy in violation of the general conspiracy statute. 18 U.S.C. § 371. The indictment on which he was convicted charged him with conspiracy "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service . . . in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana." (App. 6, n.3) The evidence presented at his trial was that he assisted Caruana, a drug smuggler, with concealment of large amounts of cash. *United States v. Hurley*, 957 F.2d 1 (1st Cir.), *cert. denied* 113 Sup. Ct. 60 (1992).

Following the conviction, the procedures required by Massachusetts law were followed.[1] After hearing, a single justice of the Supreme Judicial Court entered judgment, imposing an indefinite suspension on Hurley. *Matter of Hurley*, 9 Mass. Att'y Disc. R. 169 (1993) Hurley appealed to the full court, which

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[1] A Petition for Discipline was filed pursuant to S.J.C. Rule 4:01(8) in June, 1990 (App. 6), but proceedings were stayed pending Hurley's appeal. (App. 7) Since Hurley's conviction was for a "serious crime" as defined by S.J.C. Rule 4:01(12), he was temporarily suspended from practice on June 5, 1992, following the decision of the First Circuit. A hearing was held before a 3-member panel of the Board of Bar Overseers of the Supreme Judicial Court on January 5, 1993. The panel reported its findings and recommendation to the full Board, which voted on April 12, 1993, to file an information with the Supreme Judicial Court recommending indefinite suspension. (App. 8)

affirmed the judgment. *Matter of Hurley*, 418 Mass. 649 (1994).

Pursuant to S.J.C. Rule 4:01(18), Hurley will be eligible on June 5, 1997, to apply for reinstatement to practice.

SUMMARY OF THE ARGUMENT

The petitioner presents no federal question for review. The question of whether the Supreme Judicial Court of Massachusetts acted properly in examining the evidence underlying his felony conviction is purely one of state law.

ARGUMENT

Although the petitioner's argument is difficult to follow, he appears to be saying that the Supreme Judicial Court of Massachusetts somehow violated federal law by refusing his invitation to label his crime as "strictly a tax offense." 418 Mass. at 653; App. 11. The Court's action was improper — he seems to say — even though the Court refused to place any catchphrase label on the crime. The Court stated:

> The primary issue we decide is whether the sanction imposed by the single justice is markedly disparate from the sanctions imposed in similar cases.
>
> . . .
>
> We turn to the respondent's argument that we should consider only other 'tax offenses' in deciding whether the disciplinary sanction imposed on him was markedly disparate from the

> sanction imposed by other single justices in similar cases. Our short answer to this argument is that the appropriate level of sanctions does not depend on the catch-phrase that might be used to describe the conduct on which those sanctions are grounded. It is irrelevant to us, and we assume it was to the single justice, whether the respondent's conduct could be labelled a 'tax offense' or 'money laundering.' Instead, we look at the sanctions imposed in factually similar cases, regardless of the label which may be attached to the conduct underlying those cases.
>
> 418 Mass. at 654-55; App. 15-16

The Court compared the facts as stated in the First Circuit opinion with the facts of prior attorney-discipline cases. Based on that comparison, the Court determined that an indefinite suspension was the appropriate sanction. Of particular import was the observation that 38 of 55 attorneys who had been convicted of felonies had been disbarred or had resigned in lieu of disbarment. Hurley was treated more leniently than 69% of the attorneys convicted of felonies.

Hurley makes no reasoned argument why the Supreme Judicial Court's method of analysis was improper. His assertion that the Court should have closed its eyes to the facts recited in the First Circuit opinion and relied on a catchphrase label is frivolous and nonsensical.

The relief which Hurley requests is that the Supreme Judicial Court be instructed to compare his

conviction "with other 'tax offense' cases." (Pet. Cert., p. 54) Presumably he means only with tax offenses, since there is no showing that the Court failed to consider "tax offense" felonies in determining the sanction to be imposed.[2] His request that the Court be prohibited from examining its own precedents is utterly without foundation.

CONCLUSION

Hurley presents no federal question for decision by this court. He cites no constitutional provision which was violated. He refers to no contitutionally-protected right which was ignored. His petition should be denied.

RESPECTFULLY SUBMITTED

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March 3, 1995

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[2]Most of the "tax offense" cases which Hurley brought to the Court's attention were misdemeanor convictions for failure to file returns. There are only three recent "tax offense" felonies, all of which were brought to the Court's attention. *Matter of McCown*, 7 Mass. Att'y Disc. R. 197 (1991) (Aiding and abetting false tax returns; resignation in lieu of disbarment); *Matter of Paris*, 9 Mass. Att'y Disc. R. 257 (1993) (Tax evasion by failure to file; disbarment); *Matter of Jennings*, 7 Mass. Att'y Disc. R. 126 (1991) (Evasion of tax payments by concealment of assets; 18-month suspension). These cases clearly support the Court's decision that an indefinite suspension is appropriate to Hurley's offense.